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IN THE SUPREME COURT
OF THE
STATE OF UTAH

MARVIN YOUNG and STELLA
YOUNG, his wife,
Plaintiffs and Appellants,

vs.

GEORGE BRIDWELL,
Defendant and Respondent.

Case No.
10774

BRIEF OF RESPONDENT

Appeal from the Third Judicial District Court
Salt Lake County
Honorable Stewart M. Hanson, Judge

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Clerk, Supreme Court, Utah

INDEX

	<i>Page</i>
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	6

POINT I.

THE TRIAL COURT DID NOT COMMIT ERROR IN REJECTING APPELLANTS' THEORY OF BREACH OF CONTRACT 6

A. THE COURT CONCLUDED THAT THE RESULT WOULD HAVE BEEN THE SAME AND THERE WAS NO NEGLIGENCE ON THE PART OF ALAN D. FRANDSEN, AND THEREFORE APPELLANTS SUSTAINED NO DAMAGE.

B. APPELLANTS WAIVED ANY CLAIM OF BREACH BY PROCEEDING TO TRIAL WITHOUT OBJECTION.

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN DISMISSING APPELLANTS' ACTION 9

A. RESPONDENT HAD NO DUTY TO APPEAL.

B. RESPONDENT'S CONDUCT COULD NOT BE DEEMED NEGLIGENT IN VIEW OF THE STATE OF THE LAW IN UTAH.

C. IT CANNOT BE SAID AS A MATTER OF LAW THAT THE CASE WOULD HAVE BEEN REVERSED ON APPEAL.

CONCLUSION 17

CASES CITED

<i>Babbitt vs. Bompas</i> , 73 Mich. 331, 41 N.W. 417 (1889)	13
<i>Better Homes, Inc. vs. Rodgers</i> , 195 F.Supp.93 (D.C. W.Va. 1961)	15

INDEX (Continued)

	Page
<i>Collins vs. Wanner</i> , 382 P.2d 105 (Okla. 1963)	6-12
<i>Hadley vs. Baxendale</i> , 9 Ex. 341 [1854] 156	
Eng. Repts. 145	7
<i>Hart vs. Frame</i> , 6 Cl. & F 193, 7 Eng. Rep. 670	
(H.L. Sc. 1939)	14
<i>Hawkeye Security Insurance Co. vs. Indemnity Insurance Co.</i> , 260 F.2d 361 (10th Cir. 1958)	11
<i>Hodges vs. Carter</i> , 239 N.C. 517, 80 S.E.2d 144	
(1954)	12
<i>Lacivita, In re.</i> , 255 F.2d 365 (3rd Cir. 1958)	9
<i>Lundberg vs. Backman</i> , 11 Utah 2d 330, 358 P.2d	
987 (1961)	10
<i>Montrion vs. Jefferies</i> , 2 C & P 113 (1825)	
172 Eng. Rept. 51	12
<i>Pearson vs. Darrington</i> , 32 Ala. 227, (1858)	14
<i>Pete vs. Henderson</i> , 124 Cal. App. 2d 487,	
269 P.2d 78 (1954)	15
<i>Sandall vs. Sandall</i> , 57 Utah 150, 193 P. 1093	11
<i>Skeen vs. Peterson</i> , 113 Utah 451, 196 P.2d	
708 (1948)	8
<i>Spangler v. Sellers</i> , 5 Fed. 882, 887 (C.C.S.D. Ohio 1881)	13
<i>Stephen vs. Union Assurance Society</i> , 16 Utah	
22, 50 Pac. 626 (1897)	16
<i>Tay-Holbrook, Inc. vs. Tutt</i> , 24 P.2d 463	
(Cal. 1933)	16
<i>Yarnall vs. Yorkshire Worsted Mills</i> , 370 Pa.	
93, 87 A.2d 192 (1952)	9

TEXTS CITED

45 ALR 2d 5, 15	13
45 ALR 2d 5, 12, 13	13
45 ALR 2d 5, 30	8
45 ALR 2d 5, 14	6
7 Am.Jur 2d, Attorneys at Law § 113, 116	8
5 Am.Jur 2d, Arbitration and Award §§ 51-53	17
McCormick, Damages §§ 138, 139	8
Roady and Andersen, Professional Negligence, The Attorney's Liability for Negligence (Wade), P.222	13

IN THE SUPREME COURT
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MARVIN YOUNG and STELLA
YOUNG, his wife,

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vs.

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Defendant and Respondent.

Case No.

10774

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

Appellants have appealed a Judgment of the District Court, Third Judicial District, Salt Lake County, dismissing Appellants' action for malpractice and breach of contract against the Respondent.

DISPOSITION IN LOWER COURT

The Appellants filed suit against Respondent for breach of contract and malpractice as a lawyer. The Complaint alleged five alternative causes of action and sought \$15,000.00 damages. An Answer was filed and discovery processes followed. On 17 March, 1966, pretrial was had before Judge Joseph

G. Jeppson. Another pretrial was had April 5, 1966, and on 28 October, 1966 hearing was held before Judge Stewart M. Hanson who entered Judgment for the Respondent and dismissed Appellants' cause of action.

RELIEF SOUGHT ON APPEAL

The Judgment of the trial court should be affirmed.

STATEMENT OF FACTS

The record in the instant case is composed of the pleadings and papers in the trial below and the record and pleadings in case number 132929, *Marvin C. Young, et al. vs. F. Hyde Mortensen, et al.*, in the District Court of Salt Lake County.¹

The Appellants' Complaint alleged that the Respondent had been employed as counsel for Appellants to bring an action for breach of a lease, damages, and for eviction and restoration of leased premises (R. 1). It was alleged that the Appellants had hired Respondent personally and exclusively (R. 2). It was alleged that Appellants had a cause of action against Respondent because he did not personally represent them as they had contracted in the case of *Marvin C. Young, et al. vs. F. Hyde Mortensen, et al.* (R. 1-3). The Complaint set forth five alternative claims for relief (R. 1); however,

¹ The record of that case will be cited by using the prefix A. Page citations will not be cited since they are not numbered by the clerk.

the Appellants now contend that the trial court erred on two grounds so that consideration of all the issues of the Complaint is not necessary for determination of this appeal.

Marvin and Stella D. Young filed lawsuit against F. Hyde Mortensen, et al. (A. 1). They discharged their original counsel before trial (A) and employed Respondent. A Notice of Readiness for Trial was filed by Alan D. Frandsen, an attorney associated with Respondent. Respondent proceeded to prosecute the suit which involved a dispute over a lease (A). The lease agreement which was the subject of the litigation was for five years, from August 6, 1957 to August 6, 1962 (A attachment to Complaint). The lawsuit was pre-tried before Judge A. H. Ellett November 30, 1962, after the expiration of the original term of the disputed lease (R. 10). Prior to the expiration of the lease, the Defendants Mortensen served Notice on the Youngs of their intention to renew the lease at the same rental (A). Thereafter, Mortensens paid \$150.00 per month to Youngs, which was accepted. The lease, however, had a clause calling for renewal of the lease at a negotiated figure and Youngs sent a letter prior to expiration calling for \$450.00 per month (A).

At the time of pretrial November 30, 1962, Alan D. Frandsen appeared as attorney for the Youngs. An additional issue was raised at pretrial as to whether the payment of the \$150.00 per month

by the Mortensens after the expiration of the lease, and the acceptance of those payments by the Youngs worked to renew the lease. The pretrial order reflects the following (R. 10):

“3. Since the 10th day of August, 1962, the defendants have regularly paid to the Plaintiffs the sum of \$150.00 per month, and the Plaintiffs have accepted the same towards payment of rent.

(THE COURT: Mr. Frandsen, you say that you don't know about other payments but that the Plaintiff did accept the first payment after August 10, 1962?

MR. FRANDSEN: I believe so.”

The Pre-Trial Judge then ruled (R. 10):

“The court will hold as a matter of law that there has been a renewal of the lease on the same terms as heretofore existed; that the acceptance of the payment of the rent after the exercise of the option would constitute a renewal of the lease for a period of five years as contained in the option within the lease.”

At the trial January 7, 1963, before Judge Ellett, the appellants were represented by Alan D. Frandsen (Tr. of A-p.1). No objection to Mr. Frandsen's representation of the Youngs was ever voiced by them (Tr. of A). Mr. Frandsen again challenged the court's ruling made at pre-trial (Tr. of A-p.1, 2). Further, the court dismissed Mr. Young's action as he did not have an interest in the

leased premises (Tr. of A-p.16).² The trial court, after hearing the evidence, ruled Mrs. Young had no cause of action, and awarded the Mortensens judgment on their Counterclaim (A). No appeal was taken from that judgment. The judgment entered February 26, 1963 does not recite that the lease was renewed at the same rate that was in force but only dismissed the Plaintiffs' Complaint "no cause of action" and awarded the Defendants \$340.09, the amount requested in their Counterclaim (A). The Findings of Fact and Conclusions of Law did conclude that receipt of payment of rental operated as a waiver of the Plaintiff's right to negotiate a new rental and the lease was renewed for five years (A); however, its relevance absent a judgment was apparently only the Appellants' claim of a right to rescind. Subsequently, Youngs' Motion for new trial was made with different counsel. It does not appear what disposition was made of this Motion, but it was apparently denied.

At pretrial in the instant action, the court ruled there was no evidence of any negligence on the part of Mr. Frandsen (R. 25). At the hearing, the trial court concluded that an appeal in Civil No. 132929 would have been of "no avail" (R. 35).

The only issues raised on appeal, as the basis for reversal, are: (1) That the court erred in not

² Mr. Young is not properly a party to this action or this appeal, and was stricken as a party Plaintiff in the instant action (R. 23).

considering the Appellants' breach of contract theory, and (2) The Court erred in ruling the results would not have been different on appeal.³

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN REJECTING APPELLANTS THEORY OF BREACH OF CONTRACT:

- A. THE COURT CONCLUDED THAT THE RESULT WOULD HAVE BEEN THE SAME AND THERE WAS NO NEGLIGENCE ON THE PART OF ALAN D. FRANDSEN, AND THEREFORE APPELLANTS SUSTAINED NO DAMAGE.
- B. APPELLANTS WAIVED ANY CLAIM OF BREACH BY PROCEEDING TO TRIAL WITHOUT OBJECTION.

The Appellants contend initially that the court erred in the pretrial order in not ruling that they had a cause of action because the Respondent failed to handle their case and thereby breached his contract. It is submitted the trial court acted properly.

It is well settled that where a client seeks damages from his attorney for malpractice or breach of contract he has the burden of sustaining his cause of action as well as his damages, *Collins vs. Wanner*, 382 P.2d 105 (Okla. 1963) ; Anno. 45 ALR 2d 5, 14.

³ The appellants have referred to depositions in their brief. However, these are not a part of the record on appeal and there is no evidence that they were considered by the trial court.

It was incumbent upon Appellants to demonstrate the breach and the damages. The record is silent on the issue except for the pretrial order. However, assuming that the Appellants hired Mr. Bridwell and not the association of Bridwell and Frandsen, the trial court found no negligence on the part of Mr. Frandsen in handling the case, and Appellants have not objected to that ruling. No evidence supports the conclusion that the damages the Appellants now seek would have been avoided. Mr. Frandsen diligently pursued the court's ruling at the time of trial on the lease problem seeking to change the result. The trial indicated he was convinced of his position "as a matter of law". In no way is it explained how the Respondent's appearance and argument of the matter in place of Mr. Frandsen would have changed the trial court's ruling. After judgment was entered in Civil No. 132929, additional counsel sought to set aside the judgment and was not successful. Appellants now seek damages they contend resulted from the breach. Appellants do not seek return of a fee, but contend, in effect, that the trial court erred and that they are entitled to the damages flowing from that error. There is no evidence whatsoever that the damages they seek are the proximate result of the breach by Respondent. Appellants really are seeking special damages for the alleged breach, and in such circumstances it is basic law that the damages must be shown to have occurred due to the breach of the employment contract. *Hadley vs. Baxendale*, 9 Ex. 341 [1854];

McCormick, *Damages* §§ 138, 139. There is no showing that if Respondent had performed' Appellant's position would be any different. There being no negligence on the part of Frandsen and no indication that Respondent's performance would have changed the result, the trial court correctly disregarded the claim of breach of contract. See Anno. 45 ALR 2d 5, 30.

Since the record reveals that Appellants went to trial with Mr. Frandsen without any objection or protest they have waived any right to contend Respondent was the sole counsel. There is a presumption that an attorney appearing for a party is authorized to appear and the contrary fact must be shown by clear and convincing proof. 7 Am. Jur. 2d, Attorneys at Law § 113, 116. Nothing appears of record to support the Appellants' contention Frandsen was not authorized to represent them. No objection was made at trial that Respondent alone was Appellants' counsel. It has been acknowledged by this Court that a client may ratify or acquiesce in the employment of associate counsel, *Skeen vs. Peterson*, 113 Utah 483, 196 P.2d 708 (1948). Supporting a claim of ratification or acquiescence in this case is the fact of Frandsen preparing and signing the Notice of Readiness for Trial (A), his appearance at pretrial and his conduct of the trial.

'Respondent does not admit that the Appellants' factual contentions are true but only assumes the ~~Respondent's~~ statements for this appeal.

the fact that Judgment was entered in Civil No. 132929 on 26 February, 1963, Satisfaction of Judgment made on 4 December, 1963, and the fact that the Motion to Strike the Judgment and for a new hearing was not made by new counsel until 24 January, 1964. These facts would tend to support a claim of acquiescence and ratification, *Re Laacivita*, 255 F.2d 365 (3rd Cir. 1958); *Yarnall vs. Yorkshire Worsted Mills*, 370 Pa. 93, 87 A.2d 192 (1952), and when weighed against the presumption of authority and the absence of rebutting evidence of record, it is clear Appellants have no claim for breach of contract.

POINT II

THE TRIAL COURT DID NOT COMMIT ERROR IN DISMISSING APPELLANTS' ACTION.

- A. RESPONDENT HAD NO DUTY TO APPEAL.
- B. RESPONDENT'S CONDUCT COULD NOT BE DEEMED NEGLIGENT IN VIEW OF THE STATE OF THE LAW IN UTAH.
- C. IT CANNOT BE SAID AS A MATTER OF LAW THAT THE CASE WOULD HAVE BEEN ~~REVERSED~~ ON APPEAL.

The Appellants' second contention is that Respondent should have advised them that the trial court's decision in Civil No. 132929 could be appealed. This contention is inappropriate when examined in light of the facts in the instant case, and

that there is no reasonable basis to conclude that the trial court committed prejudicial error.

It is well settled in this state that an attorney is under no obligation to pursue an appeal on behalf of his client unless there has been some agreement or indication from the client that the attorney is to represent him on appeal. In *Lundberg vs. Backman*, 11 Utah 2d 330, 358 P.2d 987 (1961), this court ruled that an attorney hired to represent a party in a lawsuit was not obligated to undertake an appeal on behalf of the party absent an additional agreement encompassing such representation. There is no evidence in the record to indicate that there was ever any discussion between the Appellants and Respondent relative to prosecuting an appeal. The Appellants' Complaint filed in the trial court expressly states that Appellants hired Respondent for the purposes of prosecuting an action in the District Court of Salt Lake County, State of Utah. Under these circumstances Respondent had no obligation towards the Appellants with reference to an appeal. As this court noted in the Backman case:

“Before Mr. Backman could be liable for failure to perfect an appeal in time, he would have to owe to her a duty to prosecute such an appeal for her. This duty does not arise from mere employment of Mr. Backman by Appellant to represent her in defense of a case in the District Court.”

This court recognized that the obligation of an attorney terminates with the entry of the judgment in *Sandall vs. Sandall*, 57 Utah 150, 193 P. 1093. Since the Backman case seems to recognize that there was no duty flowing from Appellants to Respondent with an appellate process, it is submitted that there was no duty upon the Respondent to make an appraisal as to the likelihood of a successful appeal, in the absence of a request by the client that he do so. In *Hawkeye Security Insurance Company vs. Indemnity Insurance Company*, 260 F.2d 361 (10th Cir. 1958), the court noted that the determination of whether an appeal should be taken is a question for the principal, or the client. This being so, in the absence of some request on behalf of the client for the attorney's advice relevant to taking an appeal, the attorney is under no obligation or duty to volunteer such advice.

It is submitted that even if the court were to determine that in some instances an attorney was under an obligation to appraise his client as to appeal possibilities in the absence of a request by the client, this is not such a case. The Appellants in Point II of their brief cite no decisions from the State of Utah controlling or relevant to the issues they claim were incorrectly decided in the trial court. Further, as it will be seen later on, there appears to be a division of authority that might be applicable to the instant case. An attorney is not obligated to know with exactness the law, and certain-

ly where there is no decision from the highest court in the state it cannot be assumed that he can make a positive statement that a client should pursue an appeal on penalty of being found guilty of malpractice. As Chief Justice Abbott noted in *Montrieu vs. Jefferies*, 2 C & P 113 (1825):

“No attorney is bound to know all the law. God forbid that it should even be imagined that an attorney or a counsel or even a judge is bound to know all the law.”

As noted in *Hodges vs. Carter*, 239 N.C. 517, 80 S. E. 2d 144 (1954):

“An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.”

A similar conclusion was reached in *Collins vs. Wanner*, 382 P.2d 105, (Okla. 1963.) It is submitted, therefore, that in the absence of a request by the Appellant for an appraisal of the chances on appeal or in the absence of a clear-cut holding from this court that reversal was in order, the Respondent owed no *duty* to advise the Appellants in the manner they claim they should have been advised.

It is well settled that an attorney, like a doctor, is not an insurer of a good result for his client,

Babbitt vs. Bompas, 73 Mich. 331, 41 N.W. 417 (1889); 45 ALR 2d 5, 12, 13. Even if it could be said an attorney employed under an agreement for the prosecution of the trial of a case owes a duty to the client relating to an appeal, the facts of this case do not show any negligence. In 45 ALR 2d 5, 15, it is observed:

“In accordance with the general rule discussed supra, § 3[a], that an attorney is liable only for the possession of ordinary and reasonable skill and knowledge, it has frequently been held that a lawyer is not liable for lack of knowledge as to the true state of the law where a doubtful or debatable point is involved.”

A lead case is *Spangler vs. Sellers*, 5 Fed. 882, 887 (C.C.S.D. Ohio 1881) where the court clearly stated the standard of care applicable to attorneys.

“It did not require of him the possession of perfect legal knowledge, and the highest degree of skill in relation to business of that character, nor that he would conduct it with the greatest degree of diligence, care, and prudence. But it required that he should possess the ordinary legal knowledge and skill common to members of the profession; and that, in the discharge of the duties he had assumed, he would be ordinarily and reasonably diligent, careful and prudent.”

In Rody and Andersen, Professional Negligence, *The Attorney's Liability for Negligence* (Wade) P.222, it is observed:

“There has been universal agreement

that a lawyer is not an insurer or guarantor of the correctness of his work or of the results which will be attained. He is liable only for negligent failure to use the requisite care or skill."

and p. 225:

"On the other hand if the state of the law is uncertain or doubtful, or if there is a disagreement among attorneys ~~when~~ it is very unlikely that an attorney will be found negligent. In this connection, it may be relevant that the lower court agreed with the attorney or that he sought the advice of another attorney before taking his action."

Some cases have indicated that an attorney cannot be deemed negligent by relying on the trial court or magistrate's assertion of the law, *Pearson vs. Darrington*, 32 Ala. 227, 259 (1858); *Hart vs. Frame*, 6 Cl. & F. 193, 7 Eng. Rep. 670 (H.L. Sc. 1839). It is submitted therefore in the absence of a special duty to analyze the law in this case relative to appeal it could not be said that Respondent was negligent.⁵ Therefore, it cannot be claimed the Respondent's conduct in this case relative to advising or not advising Appellants to appeal was negligence.

Of relevance to the issues of duty, negligence, and causation is the question of whether the de-

⁵ One District Judge, now a Justice of the Supreme Court, and the trial Judge that heard this case feel that the law was sufficiently against Appellants' position to preclude recovery.

cision of the trial court would have been reversed with certainty on an appeal in No. 132929. As the Appellants correctly note in their brief, in any event they must demonstrate that the decision in No. 132929 would have been reversed on appeal. *Pete vs. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78 (1954); *Better Homes, Inc. vs. Rodgers*, 195 F. Supp. 93 (D.C. W. Va. 1961).

The facts in No. 132929 viewed most favorably to Respondent show that the lease read:

“The Lessee shall have the option to extend said lease for an additional five years, from August 10, 1962 to August 10, 1967, on the same terms and conditions as in the original lease, except the rental payment thereof. In the event that the parties hereto cannot agree upon the rent to be paid for the extended option period, then the rental shall be submitted to arbitration. Each of the parties hereto shall select an arbitrator and these two arbitrators shall select a third to determine the said rental. The rental determined by the said board of three arbitrators shall be binding upon both parties hereto.”

Note the lease refers to extended period and provides for arbitration if agreement can't be reached, thus lending emphasis to a position that the lease was really a 10-year lease with a right to terminate after five years. Prior to the expiration of the lease, on July 23, 1962 (A) Respondent sent a letter to Mr. and Mrs. F. Hyde Mortensen advising them that Appellants wanted \$450.00 per month for the

next five years or Mortensens should quit the premises. On July 30, 1962, Mr. Bernard L. Rose, representing Mortensens, replied that they elected to continue their lease at \$150.00 per month and indicated they would seek arbitration. Thereafter, Appellants accepted the \$150.00 payments and never name an arbitrator nor apparently requested arbitration. In Civil No. 132929 the court concluded this acceptance of rent at the old amount resulted in a renewal at the same terms.

The Appellants cite cases to the effect that allowing the lessee to retain possession and accepting rents does not renew the lease. These cases are not applicable. Here, the timely election of the Mortensens continued the lease, not the hold over and acceptance of rents. The Court found lessees not otherwise in default, and the Appellants do not contest this aspect of the court's finding in Civil No. 132929. A reading of the cases cited by Appellants amply demonstrates they are inapplicable here. The question then is: Was the acceptance a renewal at the \$150.00 figure? Since Appellants accepted the rents as paid by Mortensens, a clear basis existed for holding a renewal was intended. In *Tay-Holbrook, Inc. vs. Tutt*, 24 P.2d 463 (Cal. 1933), the court held that by holding over and accepting rent, the formalities for *renewal* of a lease, called for in the lease, were waived.

The conduct of the Appellants would clearly indicate a waiver of their right to arbitrate. *Stephen*

vs. Union Assurance Society, 16 Utah 22, 50 Pac. 626 (1897) ; 5 Am. Jur. 2d. *Arbitration and Award* §§ 51-53. It is submitted, therefore, the trial court's decision in Civil No. 132929 is not clearly erroneous, nor that of the court below in the case now before this court, and Respondent was not guilty of negligence.

CONCLUSION

The Appellants' contentions when examined in light of the evidence and the law indicate only that they are dissatisfied with the results of their lawsuit. There is no basis to say the court below erred, and this court should affirm the trial court judgment dismissing the lawsuit.

Respectfully submitted,

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